No. 6872

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDGAR D. ROSENBERG, HELEN ROSENBERG KAHN and CLAUDE N. ROSENBERG,
Appellants,

vs.

JOHN P. McLAUGHLIN, Collector of Internal Revenue for the First District of California,
Appellee.

REPLY BRIEF FOR APPELLANTS.

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REPLY BRIEF FOR APPELLANTS.

The opening paragraph of appellee's brief is misleading. Appellants are not seeking "to restrain the collection of the unpaid portion of a deficiency in an estate tax which had been determined by the Board of Tax Appeals and assessed against the Administrator" of decedent's estate. They seek to enjoin something entirely different, viz.: the illegal sale of their property under distraint, when no determination has been made against them for any liability for any tax and no assessment for any tax liability has been made against them. Appellants are not administrators or taxpayers. They are outsiders to the tax assessed and

volunteers without right of recovery if they pay the tax. (Appellants' Brief, pp. 30-32.)

I. THE STATEMENT OF THE CASE.

In his statement of the case, appellee attempts to make much of the fact that the estate of Natalie Rosenberg, widow of Isidore Rosenberg, was distributed to appellants and that they thereby received her interest in the property subject to sale under distraint. What appellants received from the estate of Natalie Rosenberg is of no importance in this case, because appellee is moving against them only for their alleged liability for deficiency in tax against the estate of Isidore Rosenberg. No proceedings were ever taken against the estate of Natalie Rosenberg by the Commissioner and her estate admittedly overpaid the estate tax by $1,679.20, which the Commissioner refuses to refund because appellants were denying his right to arbitrarily seize and sell their property without determining any liability against them. If a continuing lien arose against the property of the estate of Isidore Rosenberg it would not affect property passing to appellants from the estate of Natalie Rosenberg, against which no deficiency in tax was ever determined. If appellants are liable as transferees, their liability is limited to what they received from the estate of their father.

II. ARGUMENT.

Appellee admits that, unless there is a lien which may be directly enforced by distraint against appellants' property, R. S. Section 3224 does not bar appellants from injunctive relief. (Appellee's Brief, pp. 33, 34.) Appellee's entire argument is devoted to attempting to maintain that a lien attached to the gross estate of Isidore Rosenberg at the date of his death and continued as a burden on the property of the estate after the tax was paid and the estate was distributed. We believe appellee's position to be unsound and entirely beyond the clear meaning of the statutes involved.

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1. APPELLEE'S CLAIM OF A LIEN UNDER SECTION 409 OF THE 1921 ACT.

Appellee insists that the decision of *Page v. Skinner,* 298 Fed. 731, is authority for the imposition of an "all covering" lien upon the gross estate of a decedent at the instant of death and that such a lien is the one which is authorized by Section 409 of the 1921 Act. The decision in that case contained a brief statement upon which appellee relies, viz.:

> "The imposition took effect at the time of death and the tax became at once a lien on the property of the estate, enforceable by sale, if not paid, on proceedings in court."

We admit that when Isidore Rosenberg died in 1923, the estate became at once liable for a tax under the Revenue Act of 1921, which was then in force. We affirm that all other than the words "the imposition

took effect at the time of death" contained in the quotation from *Page v. Skinner,* supra, is *obiter dictum,* contrary to direct statutory provisions, and therefore not law and contrary in effect to Section 409 of the 1921 Act. There was no lien involved in the case, no issue raised to cause the Court to consider a lien, and no statutory lien provision considered by the decision. The case involved an action to recover taxes paid and no lien could become an issue in such a case, nor could any words of the decision on an issue not before the Court become effective ordained law. We submit the following points for consideration:

(a) A Court may not legislate. Its decision may create a judgment lien against property of a party to a specific case, but such a decision cannot originate a fixed general lien law. It might create a precedent for other Courts to follow in specific cases, but a specific case would have to be presented before a Court and a judgment rendered against the person liable for a tax before a judgment lien could arise. No judgment against appellants has been rendered.

(b) No interpretation of Section 409 of the 1921 Act can be inferred from the decision of *Page v. Skinner* (supra), because neither that section nor the corresponding sections of any other estate tax statute were before the Court for any consideration.

(c) None of the Revenue Acts contain provisions for a lien on the gross estate of a decedent before the "due date" (one year after death). If an estate tax is paid on or before the due date,

no lien arises, unless at some subsequent time an additional tax or deficiency in tax is determined, and then the lien is a thing apart from the lien provided for the tax shown on the return. (Sec. 407, Act of 1921; Sec. 308 (b), Act of 1926; R. S. Sec. 3186; 26 U. S. C. A., Sec. 115.)

(d) Appellee's claim that a lien under Section 409 springs into existence automatically *at death* is contrary to the plain language of the section. His contention is based on a theory that Section 409 and the dictum of *Page v. Skinner,* conjointly create a lien law which permits liens to spring from thin air and contrary to express statutory provisions. The decision states that "imposition of the estate tax takes effect at the time of death, and the tax at once becomes a lien." In other words, at the moment of death the tax is a liability and, simultaneously, the lien arises. Section 409 provides "that unless the tax is *sooner* paid in full, it shall become a lien for ten years upon the gross estate of the decedent." To hold that the quoted language of Section 409 is conjunctive with the quoted language of *Page v. Skinner* (supra) would mean that a lien would be created before a tax liability could be ascertained, computed, or paid. If Congress so intended, why did it not so state in clear statutory language? No such intent of Congress can be deduced from the estate provisions of any revenue act. Assuredly the word "sooner" used in Section 409, applied to language to be found in the 1921 Act and not to something outside the

> Act. It contemplated an opportunity to pay the estate tax shown on the return before a lien arose. That opportunity, under Section 406, is one year after death and not at the time of death. The tax could not be paid before death.

Let us now consider the cases appellee cites in support of his position that a lien attaches at death and within the contemplation of death. (Appellee's Brief, pp. 16-19.)

In *United States v. Ayer,* 12 Fed. (2d) 194, *the government brought suit before the Revenue Act of 1926 was passed* against the estate of Frederick Ayer (which was not distributed), through its executors, to recover the balance of a federal estate tax. Ayer died while the Revenue Act of 1916 was in force, but the 1918 Act having been passed shortly after death, the additional tax computed became enforceable under the terms of the latter Act. Action was not to enforce any lien, but to enforce payment of an addition to the tax returned under an Act which made no special provision for the treatment of a deficiency, as does the 1926 Act. No issue of a lien was before the Court, though, in commenting on the estate tax sections of the 1918 Act, the Court refers to the *obiter dictum* doctrine of *Page v. Skinner,* supra, and cites that case and *Hertz v. Woodman,* 218 U. S. 205, only after quoting from Section 409 and by way of comment stating "it has been held" that the lien attached at death. The statement was voluntary and not required, and made no law. *Page v. Skinner* involves the Revenue Acts of 1916 and 1918, while *Hertz v. Woodman*

involved the inheritance tax imposed by the war revenue act of 1898. The latter case does not declare the positive doctrine which *Page v. Skinner* attempts. However, the doctrine which the decision in *U. S. v. Ayer* seems to accept was later overruled by the United States Supreme Court in *U. S. v. Woodward,* 256 U. S. 632, 635, 65 L. Ed. 1131, 1135, and other cases cited in appellants' opening brief. (pp. 19-24.)

Reverting to consideration of *U. S. v. Ayer,* we cannot see how the case gives any weight to appellee's contention of a lien arising at the instant of death and continuing after the tax was paid to secure a possible additional tax, which might never be asserted. If such a lien, with such direct methods of recovery, existed, why did the government sue to recover the additional tax (such as is here involved) instead of resorting to distraint under the lien? The findings show no claim of lien but, to the contrary, disclose that the government sought to recover only by judgment in an action of contract. Why a circuitous route by way of the Courts, if the direct distraint procedure was so certain as appellee claims? Also, the case is directed against the estate and not against any distributees thereof. Moreover, the government resorted to one of the alternative remedies which appellee asserts and which we do not question. It will thus be seen that the case of *U. S. v. Ayer* has no application to appellants' contentions in this case.

In *Crooks v. Loose,* 36 Fed. (2d) 571, we find an action brought for the refund of a tax paid under the 1921 Act. Surely no lien could be involved in such an action, for no lien lies against the government. The

citation of *Page v. Skinner* regarding a lien had no place in the issues or the decision. The mere dictum of such a case has no weight.

Ewbank v. U. S., 37 Fed. (2d) 383, was an action at law by trustees under a will for a refund of taxes paid under the 1918 Act. The issue was whether an hiatus existed, due to the repeal of the 1918 Act and the enactment of the 1921 Act, which freed the estate from tax. Again no lien was at issue because the full tax had been paid and no lien could exist against the United States. The point for decision was when the estate became liable for the tax and the Court rightly held that the liability arose at the time of death. However, the reference to *Page v. Skinner* regarding the time of attachment of a lien could have no application to the issue decided and was *obiter dictum.*

In *O'Brien v. Sturgess,* 39 Fed. (2d) 950, we find another refund case brought by executors of an estate to recover taxes paid under the Revenue Act of 1918. We find the same issue as was raised in *Ewbank v. U. S.,* supra. The Court cites *Page v. Skinner,* but again we find the reference to a lien to be pure *obiter dictum* because no lien was involved or could be involved.

Both parties rely to some extent on the decision in *U. S. v. Cruickshank,* 48 Fed. (2d) 352. This was a suit in equity, to collect an additional tax owing to the United States under the Revenue Act of 1918, brought against the executors of an estate (in their fiduciary capacity and as individuals) and a trustee, to which the estate had been distributed. There was no lien at issue and the decision makes no reference to *Page v.*

Skinner or its *dictum*. Judgment was rendered against the executors and trustee in their fiduciary capacity. No personal liability was imposed on the executors nor was the trustee held liable as a transferee. The theory of the Court, though not clearly expressed, undoubtedly was that the estate had not been distributed in fact, but had been passed from the executors to the trustee for completion of the testamentary disposition. However, it will be noted that the deficiency sued upon was determined before the 1926 Revenue Act became effective and the decision clearly states that had the deficiency been disclosed after that Act became effective (as was the fact in this case) it would have been different on account of Section 308 (a) of the 1926 Act.

Leighton v. U. S., 61 Fed. (2d) 530, a case decided by this Court, lends no aid to appellee. No lien was at issue. The action was one brought to recover a tax deficiency from transferees. The decision states that "Warrants of distraint were issued against the corporation," the taxpayer "and returned unsatisfied". The same process that occurred in this case, but the government did not attempt to take the transferees' property by virtue of the warrants issued against the taxpayer, as it is attempting to do in this case. Instead it resorted to suit against the transferees to recover. Why did it do so, if the method of collection proposed against appellants is legal and arbitrarily so simple?

Not one of the cases above considered supports appellee in his contentions that the warrant of distraint issued against the estate can be effective in

distraining appellants' property, or that a lien exists on the property of the appellants for a deficiency determined after the estate was distributed and after the 1926 Act was in force.

Let us again examine the portion of the decision in *Page v. Skinner,* on which appellee relies, to see whether it applies to this case, as he contends. The language quoted (supra, Appellee's Brief, p. 16): "the tax became at once a lien on the property of the estate, enforceable by sale, if not paid, *on proceedings in court,*" leaves appellee far separated from his claims. Where are his proceedings in Court, under which he might enforce such a lien as he conjures by sale of appellants' property? Appellants have never been sued. How can distraint operate under this condition? In *U. S. v. Ayer,* supra, *U. S. v. Cruickshank,* supra, and *Leighton v. U. S.,* supra, we find the government bringing suits and not attempting to stretch the scope of distraint warrants to cover taxpayers and every suspected outsider.

Appellee complains that we show no direct authorities to support our contentions here. How can we, when the very cases cited by him show that the government usually resorted to suit and not to illegal distraint?

Let us now turn to the statutes to see what, if any, lien might arise on the determination of a deficiency after the distribution of the estate.

2. THE DEFICIENCY DETERMINED BY THE BOARD OF TAX APPEALS IS A LIABILITY DISTINCTIVE FROM THE TAX SHOWN BY THE RETURN AND A LIEN FOR A DEFICIENCY IS SOMETHING APART FROM A LIEN FOR THE TAX.

Section 407 of the 1921 Act distinguishes between the tax shown on the return and an "additional amount of tax" found after the time for payment of the tax shown upon the return. Section 407 is notable in that it provides for a specific lien for an "additional" tax on a different basis than the lien created for the tax shown upon the return. The lien under Section 409 of the 1921 Act is, therefore, a lien, only for the tax shown upon the return, while the lien imposed by Section 407 is something apart—dependent upon the contingency of the Commissioner finding an "additional amount of tax". No lien for the returned tax ever arose in this case because the tax was paid "sooner" than the due date. (*Kelley v. U. S.*, 30 Fed. (2d) 193.) No lien for the "additional" tax ever arose under Section 407, for no such addition was determined while the 1921 Act was in force or before the estate was distributed in 1925. (Tr. p. 4.) Lien statutes must be strictly construed. (Appellants' Opening Brief, pp. 14, 15, 21.) So Sections 407 and 409 cannot be fairly read and given a different interpretation than that above.

Appellee naively states (Brief, p. 33) that the word "sooner" as used in Section 409 refers to the lapse of the ten-year period of the lien provided therein. While we insist that no lien arose under Section 409 in this case, we cannot let such an absurd interpretation pass without comment. The section states: "That

unless the tax is sooner paid in full, it shall be a lien." Under this language there is but one interpretation. There must be a failure to pay the tax on the due date before a lien can arise. "Sooner" cannot refer back to a lien to be created only after a failure to pay a tax. Furthermore, *U. S. v. Ayer,* supra, contains no word in support of appellee's contention.

Section 306 of the 1926 Act provides: "As soon as practicable after the return is filed the Commissioner shall examine it and shall determine the correct amount of the tax." This can have no other fair meaning than that after the return is filed, the Commissioner may have a reasonable time within which to audit the return and ascertain whether an additional tax is due. Certainly it should not mean that he may delay examination of the return indefinitely (three years in this case) and thereby delay distribution of an estate, or subject distributees to an unknown lien if distribution is made, when the Probate Court, the executor and the legatees are without notice of any government claim for additional taxes. (See, *Lindley v. U. S.,* 59 Fed. (2d) 336, 338, at pars. 1-4.) Congress has given no indication of such an intention.

Under Section 307 of the 1926 Act (the act in effect when the deficiency was found), all in excess of the tax returned becomes a "deficiency", as contradistinguished from the "tax" shown on the return. The Act treats the "tax" and the "deficiency" as distinctive things, as instanced by the fact that an executor has no right to appeal to the Board of Tax Appeals for any error in the "tax", while that right

is expressly granted for a "deficiency". An executor may pay the "tax" shown on the return years before the Commissioner examines the return and computes a "deficiency" as was the fact in this case. Thus, the differentiation between a "tax" and a "deficiency" is something necessary and warranted.

Section 314 (a) of the 1926 Act (the successor to Section 408 of the 1921 Act) provides that if the "tax" is not paid on or before the due date, it shall be collected under the provisions of general law or appropriate Court proceedings and then clearly distinguishes a "tax" from a "deficiency" by stating: "This subdivision in so far as it applies to the collection of a deficiency *shall* be subject to the provisions of Section 308." This provision, like Section 407 of the 1921 Act, marks a deficiency or additional tax as something different from the "tax shown upon a return". The returned tax may be collected under general law or through the Courts, but a deficiency can be fixed and collected only after compliance with Section 308 of the 1926 Act, and that Act contains no specific provisions for a lien for a "deficiency". Thus, every method of collection—assessment, lien, or distraint—is suspended until Section 308 permits the Commissioner to proceed. Should the Commissioner attempt to ignore Section 308 (a), he may be enjoined from collection under general law. Until his determination of a deficiency becomes definite under Section 308, he may not resort to assessment, lien, or distraint for collection. Such resort is then controlled by general law (R. S. Section 3186; 26 U. S. C. A., Section 115) under which no lien arises until the assessment list

is received by the Collector. When the Collector received the assessment list for the estate of Isidore Rosenberg, there was no estate whereon a lien might rest. (*U. S. v. Cruickshank,* 48 Fed. (2d) 352, 356, par. 4.)

Section 315 (a) of the 1926 Act (the counterpart of Section 409 of the 1921 Act) contains no provision for a lien for a "deficiency" and only refers to a lien for a "tax"; that is, the tax shown by the return. The proviso of that section, "Unless the tax is sooner paid in full", unmistakably refers to the "due date" mentioned in Section 314 (a), because no other "date" can be found in the Act. The "due date" has no application to a "deficiency", because the last sentence of Section 314 (a) expressly excludes it. Section 308 does not provide for any "date", when appeal is taken to the Board (as it was by the estate of Rosenberg), other than provided in Section 1005 of the 1926 Act, which are far different from the "due date" fixed by Section 314 (a) for the tax shown on the return.

If a lien under Section 315 (a) could arise against the estate of Rosenberg for the deficiency it would be limited, by the words "unless sooner paid in full", to the date the decision of the Board became final under Section 1005 (a) (1), that is six months after the decision of the Board was rendered on January 16, 1929. (Section 308 (g).) Then the estate was but a name, its assets having been distributed long before.

A comparison of the first paragraph of Section 407 of the 1921 Act with Section 314 (a) of the 1926 Act

distinctly shows that the liens created by Sections 409 of the 1921 Act and 315 (a) of the 1926 Act were never intended to apply to an "additional tax" or a "deficiency" and that the payment of the tax shown on the return discharged any lien therefor, as was held in *Kelley v. U. S.*, 30 Fed. (2d) 193. Therefore, if any lien existed under appellee's interpretation of Section 409 of the 1921 Act and *Page v. Skinner* (supra), it was erased by payment. No additional tax having been determined before distribution, the assets of the estate passed to appellants, as distributees, without lien.

Furthermore, Section 318 (a) of the 1926 Act shows that the only estate tax lien created by the 1926 Act (Section 315 (a)) does not create a lien for a "deficiency". The section provides:

> "If * * * the Commissioner determines that any assessment should be made in respect of any estate or gift tax imposed by * * * *the Revenue Act of 1921,* the Commissioner is authorized to send by registered mail to the person liable for such tax notice of the amount proposed to be assessed, which notice shall for the purposes of this Act, be considered a notice under subdivision (a) of section 308 of this Act."

In other words, the tax added to that which was returned in 1921 becomes a "deficiency" when, as in this case, it was determined after the 1926 Act became effective. This section becomes mandatory in so far as a lien for a "deficiency" is concerned, because, for the purpose of determining a "deficiency", the last sentence of Section 314 (a) uses the words: "Shall be

subject to the provisions of section 308." Also, because Section 308 (a) deprives the Commissioner of the right to assess, collect or distrain for a "deficiency" until notice thereof has been mailed to the person against whom the deficiency has been determined, and then not until the determination has become final.

The estate tax provisions of the 1921 Act were repealed. Under Section 318 (a) of the 1926 Act, the Commissioner's only right under the 1921 Act in determining a "deficiency" against the Rosenberg estate, was to compute the amount at the rate prescribed in the 1921 Act. (*U. S. v. Cruickshank,* 48 Fed. (2d) 352, 356.)

A study of all the sections of the 1921 and 1926 Acts discussed above is convincing that, where a "deficiency" is determined, under the 1926 Act the Commissioner must resort to Section 308 and fully comply with its requirements before he can assess, lien, or distrain the property of the estate for a "deficiency". He complied with Section 308 (a) with respect to the estate herein involved. After the decision of the Board of Tax Appeals had become final, he attempted to proceed, in accordance with Section 308 (b) and the general law mentioned in Section 314 (a), to assess against and collect the "deficiency" from the barren estate. He could not collect from the estate because no estate remained; warrant of distraint against the estate could only be enforced against property in the estate, and there was none.

To further demonstrate that the "tax" mentioned in Section 409 of the 1921 Act and in Section 315 (a)

of the 1926 Act are to be distinguished from a "deficiency", we call attention to Section 904 of the 1926 Act which confers jurisdiction on the Board of Tax Appeals. For determination of matters relating to estate taxes its jurisdiction is restricted by Sections 308 and 316 to the determination of "deficiencies" and the liabilities of transferees and fiduciaries. No jurisdiction over the "tax" shown on the return is conferred on the Board. The return tax is a confessed liability, which must be paid within one year after death or subject the estate to a lien under Section 315 (a) of the 1926 Act. But no lien for a "deficiency" can arise until Section 308 is fully complied with (Section 314 (a)), because the Commissioner's determination is not binding on the taxpayer, or complete or enforceable, but remains entirely tentative until, under one of the two contingencies provided in that section, the determination becomes ratified and enforceable. The determination by the Commissioner is uncertain as to amount and enforceability until a final determination under Section 308 makes a proposed liability something definite. Congress expressed no intention to create a certain lien on an uncertain liability. Section 308 (a) withheld from the Commissioner all right to enforce his uncertain determination of a "deficiency" and granted right to enjoin him if he varied from the course prescribed. (*U. S. v. Cruickshank,* 48 Fed. (2d) 352, 357.)

The deficiency herein involved was assessed July 27, 1929 (Tr. p. 4), and the assessment list therefor was received by the appellee about August 14, 1929 (Tr. pp. 11, 12), more than five years after the estate was

distributed. How could a lien then arise against the estate? Section 308 of the 1926 Act, under which the Commissioner and the administrator submitted the deficiency issue of the estate to the Board of Tax Appeals, contains no provision for a lien. However, the language of subsections (b), (c) and (h) of Section 308 indicates that assessment and collection shall be in the same manner as provided in R. S. Section 3182 (26 U. S. C. A., Section 102) which, with R. S. Sections 3184 and 3186 (26 U. S. C. A., Sections 104 and 115) constitute the general law provisions where there is no specific statutory provision creating a lien, as in this case of deficiency.

Certainly no lien could be imposed against any property not in the estate when the deficiency determination became final and assessment was made, nor could warrant of distraint issued under the assessment become effective against the estate or any one else, because the estate had long been barren. The decision of the Board of Tax Appeals could warrant no lien or distraint against any property not within the estate, because the "deficiency notice" was directed only to the estate (Tr. p. 11) and the decision was against only the estate. (*Rosenberg v. Commissioner,* 14 B. T. A. 1340.) Under that decision, which was binding on the Commissioner, assessment, lien and warrant of distraint could be directed only against the estate and affect only property remaining therein.

When the appellee and the Commissioner found the estate of Rosenberg destitute of property to lien or distrain, their resources to create a lien were exhausted unless resort was had to Section 316 of the

1926 Act to proceed against the transferees and thereby obtain a lien and opportunity to distrain. The Commissioner ignored Section 316, but this Court may not overlook it in considering the question as to whether a valid lien has arisen against appellants' property.

Section 316 of the 1926 Act is important in determining whether a lien exists against appellants as transferees. We will not discuss it from the standpoint of appellee. (See Appellee's Brief, pp. 11-15.) Appellee contends that he had three remedies: (1) a suit in equity, (2) transferee proceedings under Section 316, and (3) by pursuing a lien upon the property. His first remedy, if the right exists, has not been invoked. He has refused to resort to his second remedy. His third remedy does not exist, because we have shown that no lien ever could attach to the property of appellants under the statutes. If appellee desires a lien he must, by the mandatory provisions of Section 316, proceed in accordance with that section and Section 308. If he does not so proceed he may make no assessment of the deficiency or transferee liability nor distrain or proceed in Court for collection. Section 316 (a) clearly provides that transferee liabilities *shall* be subject to the same restrictions as provided in the case of a deficiency. (See Section 308.) Therefore, no lien for a transferee liability can be obtained except after compliance with Section 316. We are not here arguing about remedies available to the government, but are insisting that the attachment of a lien is distinct from remedies for the recovery of a transferee's liability.

Appellee seems to deny any application of the lien provisions of R. S. Section 3186. (26 U. S. C. A., Section 115.) As the warrant of distraint shows on its face that it was issued pursuant to that section, appellee's position seems peculiar. We believe we have shown that the only lien that could arise on a deficiency is one under the section, because the Revenue Act of 1926 creates no specific lien for a deficiency.

The foregoing detailed analysis of the statutes has been made to demonstrate that neither under the 1921 Act or the 1926 Act any lien rested on the gross estate of Isidore Rosenberg which would encumber the property distributed to appellants. Also, if no lien rested on the property when distributed, none of the subsequent proceedings against the estate created a lien on the property which appellants received. If no lien encumbered appellants' property, appellee admits that they are entitled to the relief prayed for. (Appellee's Brief, p. 34.)

In this regard we desire to call the Court's attention to the latest decision relating to distraint against transferees upon warrant issued against the taxpayer. An income tax was assessed against the Wyoming Coal Co. and distraint warrant was issued against that company. With that warrant a deputy collector sought to levy against the bank account of the Lion Coal Co., transferee of the Wyoming Co. Farr, an officer in both companies, was present when the deputy collector undertook to levy on the bank account, and taking a cashier's check on the Lion Company's account for the amount of the tax and interest, he

delivered it to the deputy collector. The U. S. Circuit Court of Appeals for the Tenth Circuit in *The Lion Coal Co. v. Anderson,* III (323) C. C. H. Federal Tax Service (1932), pp. 9488, 9490 (decided December 15, 1932), said:

> "Prior to the enactment of Sec. 280" (the income tax parallel of Section 316), "Revenue Act, 1926 (44 Stat. 61), *a tax liability could only be enforced against a transferee* of the taxpayer's property *by a suit in equity or an action at law* (Phillips v. Commissioner, 283 U. S. 589), and *property of such a transferee could not be lawfully subjected to a distraint for taxes assessed against the transferor.*
>
> It follows that *the bank account of the Lion Company could not be lawfully subjected to the distraint and levy.* Was it so subjected? *Distraint is regulated by statute.* No sale can be made for a period of ten days after the levy. Sections 117-19, Title 26, U. S. C. A. Such a procedure was not carried out. Instead, when the deputy collector undertook to levy upon the bank account, the bank's officer prepared a cashier's check and delivered it to Farr, an officer of the Lion Company, who then gave it to the deputy collector. Farr protested solely on the ground that the tax of the Wyoming Company was being collected for the wrong year.
>
> We think the effect of the transaction was not the unlawful subjection of the bank account to a distraint, but a payment made under protest by the Lion Company. The Lion Company instead of paying the tax, *could have enjoined the distraint and sale of its bank account for such tax.* Sec. 3224, R. S., providing that 'no suit for the

> purpose of restraining the assessment or collection of any tax shall be maintained in any court,' *would not have inhibited such an injunction. The injunction would not have been against the collection of a tax, but against the enforcement by distraint of a legal or equitable liability of a transferee* of the taxpayer's property." (Italics and parenthesis supplied.)

The case cited deals with a payment made before the enactment of the 1926 Act. However, it conclusively holds that a distraint warrant issued against a taxpayer cannot be utilized to distrain and levy against the property of a transferee and, also, that despite the provisions of Section 3224, R. S., injunction could issue to enjoin distraint of a transferee's property under a warrant issued against the taxpayer. *This is exactly the position which we assert.* The case cited is in accord with the cases cited on pages 40-49 of appellants' opening brief.

If the Court gives any consideration to a lien existing under Section 409 of the Revenue Act of 1921, then the foregoing decision would be directly applicable to the contentions of appellants. They are not attempting to enjoin the collection of a tax, but are seeking to enjoin the enforcement by distraint of a legal or equitable liability of transferees. The Section 280 referred to in the decision is the income tax parallel to the estate tax provision regarding transferees found in Section 316 of the 1926 Act.

3. THE REMEDIES CLAIMED BY APPELLEE DO NOT CREATE THE LIEN HEREIN CONTESTED.

Appellee is apparently confused over our reliance on Section 316 and reference to the remedies available to the government. (See Appellee's Brief, pp. 11-15.) The remedies for collection by the government are not at issue here, except in so far as the action of appellee in this case is concerned. The government might have sued appellants under the "equitable trust" doctrine, but it did not do so. Such a suit would not be premised on a lien. The government might have proceeded against appellants under Section 316 of the 1926 Act, but it refused to do so. It then claims a third remedy: "pursuing a lien upon the property." This remedy is important in this case only because it involves the question of a lien, under which distraint may be exercised.

It is our contention that the third remedy is entirely barred. First, because no lien is available to warrant distraint and, second, because Sections 316 and 308 prohibit the utilization of such a remedy. The first reason has been amply discussed in the preceding section of our argument.

Section 316, relating to distributees of an estate as transferees, distinctly states that the liability of a transferee *shall* "be assessed, *collected* and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax * * * (including * * * the provisions authorizing distraint * * *)." This provision requires reliance upon Section 308 for procedure and limitation. That section makes no provision of any kind for a lien for

a deficiency and, consequently, none for a transferee liability. But it does say that "*no distraint* or proceeding in court" shall be begun until notice of determination is sent and, if appeal is taken to the Board of Tax Appeals, not until its decision becomes final. Sections 316 and 308 therefore prohibit distraint against a transferee until the decision of the Board has become final. After the decision becomes final a lien may arise under R. S. Section 3186 (26 U. S. C. A., Section 115) under which appellee might distrain. However, this background for his present attempt to distrain is absolutely lacking. The prohibition on "collection" until Sections 316 and 308 have been complied with is, of itself, a prohibition on distraint, for distraint is but a method of "collection". But, in addition to prohibiting collection, the sections prohibit "distraint". Thus, the remedy appellee seeks to assert against appellants is not available or legal until the Commissioner complies with the sections mentioned. (See *Lion Coal Co. v. Anderson,* supra.)

We wish it understood that we are not here urging that Section 316 is an exclusive remedy, as appellee seems to understand to be our position. We do contend, however, that as the government has failed to comply with the available primary remedies, the remedy sought to be used in this case is premature and unavailable under Sections 316 and 308 of the 1926 Act.

4. THE CASE OF KELLEY v. UNITED STATES.

In his brief (pp. 27-31) appellee seeks to show that *Kelley v. U. S.*, 30 Fed. (2d) 193, is no authority for any of our contentions in this case. Before discussing the case it may be well to point out that appellee misconceives our position regarding the deficiency at issue herein. We do not contend in this case that the deficiency is separable into two parts—one an additional tax and the other a refund added thereto. And we do not rely upon *Kelley v. U. S.* to support any such contention. We admit that the government had a remedy to recover an erroneous refund. We rely on that case as authority for our claim that no lien was imposed on the property of the estate of Isidore Rosenberg by Section 409 of the 1921 Act.

In the *Kelley* case, the government brought suit in equity to enforce a *lien* under Section 409 of the 1918 Act (which is identical with Section 409 of the 1921 Act) for the amount of a refund erroneously paid, as a part of the estate tax. That case is parallel to the one at bar on the following points: (1) The estate tax shown on the returns in each case was paid before the "due date" prescribed in Sections 406 of the 1918 and 1921 Acts; (2) long after the estate tax was paid, refunds were allowed in both cases; (3) the Commissioner asserted a lien to exist under Section 409 of the 1918 Act in the *Kelley* case and, in this case, asserted a lien for a deficiency under Section 409 of the 1921 Act after the estate had been distributed and the 1921 Act had been repealed. Up to the time the refunds were made and until they were determined to have

been erroneously paid, the status of the two estates was the same.

When the deficiency was determined under the 1926 Act against the estate of Isidore Rosenberg it was, as we have shown in subsection 2 of this argument, something apart from the tax contemplated by Section 409 of the 1921 Act. The deficiency was not determined until after the estate was distributed, but appellee insists that it, and the amount of the erroneous refund included in it, constituted a part of or recreated a lien under Section 409 of the 1921 Act. We therefore believe that the decision of this Court in the *Kelley* case destroys appellee's claim. And, it should be remembered, that case is the only one considering a lien under Section 409 (which is the same in both the 1918 and 1921 Acts).

This Court, in deciding the *Kelley* case, considered whether the government could proceed in equity to enforce a lien under Section 409 and held that it could not, because no lien existed, saying:

> "When once paid, a tax is gone, and a refund of the money does not restore it. 'If the owner or any other person entitled to make payment of the tax shall do so, the *lien will not only be discharged absolutely, but all authority to proceed further against the property will be at an end.*' " (Italics supplied.)

We maintain that this is conclusive as to the correctness of our position. At the time the erroneous refund was found in this case, all taxes had been paid and there was no lien on the estate. The finding of that error in 1929 could not, under the foregoing

quotation, restore the lien any more than it could in the *Kelley* case—the 1921 Act has been repealed and revival of a lien thereunder was impossible. The determination of the deficiency was entirely a result of the erroneous refund. The determination that the refund was erroneous resulted in an increase of the amount of the estate tax so that a deficiency could be found. A deficiency being found the erroneous refund was added to it. Had the administrator immediately paid the tax deficiency, no method of recovery of the erroneous refund would have remained to the Collector but to sue in law as this Court required in the *Kelley* case. Thus, we see that the decision in the *Kelley* case is decisive of the lien issue in this case.

Our conclusion is based upon arguments already detailed in subdivision 2, supra. The lien under the 1921 Act was discharged by payment and the only lien upon which appellee relies is one which he insists was maintained as a result of that Act. A lien against the estate under the 1926 Act would be a lien against nothing, for the estate was fully distributed before that Act went into effect. The tax under the 1921 Act was paid while that Act was in force, and under the facts related, none could arise under that Act.

Appellee cites *Levy v. Commissioner,* 48 Fed. (2d) 725, to oppose our interpretation of the Kelley decision. We see nothing in that case to minimize the direct declaration of this Court in the *Kelley* case nor to affect our claim that the Kelley ruling is applicable here.

In the *Levy* case the estate does not appear to have been distributed when the deficiency was determined, here it was. In that case the executors were the appellants to this Court from the Board of Tax Appeals decision upholding the determination of the Commissioner, a different situation from that appearing in the *Kelley* case. In the *Levy* case, no question of the existence or continuance of a lien arose, while in the *Kelley* case the non-existence of a lien was the real issue upon which this Court remanded the case to the lower Court. In the *Levy* case the Court failed to give any attention to Section 315 (a) which provides that unless the tax is paid "sooner" than the "due date" fixed in Section 314 (a) it shall become a lien, nor the exclusion of a "deficiency" from lien, collection or distraint found in Section 314 (a). There is nothing in Section 407 of the 1921 Act to warrant a holding that a lien which did not arise while the 1921 Act was in force could retroactively be put in force by the determination of a deficiency and thus create a lien under Section 409 of the 1921 Act long after that Act had been repealed. Sections 318 (a) and 308 of the 1926 Act absolutely preclude such an interpretation. A statute is not retroactive unless specifically so declared in the statute and there is no provision for retroactive revival of estate tax liens in the 1926 Act. The Revenue Act of 1921 was repealed and the treatment of any deficiency in a tax which accrued under that Act must be under the provisions of the 1926 Act. (See, Section 318 (a).) Such treatment means that if any lien is created it must be under the Act of 1926.

5. PROCEDURE BY DISTRAINT.

On pages 23 and 24 of his brief, appellee states that procedure by distraint may be utilized only when there is a lien on property belonging to the person liable to pay the tax or on property which has passed into other hands while the lien exists. We can admit this statement without grant of any comfort to appellee.

When the deficiency against the estate of Isidore Rosenberg was determined, so that a lien might have arisen, there was no property in the estate (the person liable for the tax) upon which a lien could rest or against which distraint warrant might issue. Appellants did not take property burdened by lien from the estate, so no lien rests on their property nor can it be distrained legally.

However, we find appellee's discussion of procedure on distraint deeply silent on the procedure attempted here. Where is his authority for distraint against the property of appellants on a warrant addressed to someone else? A warrant is a process which operates only against the person (in this case the estate) named therein. (Appellants' Opening Brief, p. 15.) No warrant of distraint directed to the estate may operate against appellants' property, as transferees. (*Lion Coal Co. v. Anderson*, supra.)

Appellee's procedure on distraint is entirely illegal because (1) there was nothing in the estate to which a lien could attach when the deficiency, which might have created a lien, was determined, (2) the distraint warrant, under which appellee seeks to sell appellants' property, is directed to an estate and not to appellants,

and (3) appellants have in no way been held to be liable as transferees.

III. COMMENT ON MISCELLANEOUS POINTS.

(a) We have set forth our reasons for right to injunction in this case at some length in appellants' opening brief. (pp. 27-56.) Appellee has failed to disclose any good reason in his reply brief to show why injunction should be denied, but, to the contrary, has admitted (Appellee's Brief, pp. 33, 34) that we are *not* barred from injunctive relief by the provisions of R. S. Section 3224. (26 U. S. C. A., Section 154.) This admission should assure us the relief sought. We direct the Court's specific attention to the paragraph at the top of page 34 of appellee's brief. As we read it, after the admission found on page 33, appellee tacitly admits that in this case his proposed actions, which we seek to enjoin, would be an unauthorized trespass upon appellants' property. This would seem to warrant no other action by this Court than to reverse the decision of the Court below and direct that injunction issue.

(b) Appellee states that he can see no reason why the beneficiaries or heirs should have the right to litigate the merits of a tax after the administrator has litigated it. (Appellee's Brief, p. 34.) This is rather an astounding statement. The rights of transferees are independent from those of an executor and may be adverse. The statute provides a procedure for their protection, and for appellee to argue to the contrary in the face of so many Court decisions seems to be a

futile grasp at a straw in a last endeavor to save a losing case.

(c) On pages 31 and 32 of his brief, appellee seems to misunderstand our views as to the application of the word "sooner", as used in Section 409 of the 1921 Act, to the "due date" as used in Sections 406 and 408. We believe that we had been definite in explaining our meaning in our opening brief and believe we have made it clear in subdivision 2 of our argument (supra). However, we do not desire the Court to mistake our explanation. While the 1921 Act was in force no lien for estate tax could arise until the "due date", defined in Sections 406 and 408, had arrived. If the tax was not paid "sooner" than that "due date" it at once became a lien on that date, whether or not a return was filed. If a return was filed and the tax shown thereon was fully paid "sooner" than the due date, no lien would arise if the return was made in good faith. And we might inject here that lack of good faith has never been charged against the Rosenberg return. If, during the time the 1921 Act was in force, the tax shown on the return was paid within the specified time and an "additional tax" was found to be due as provided in Section 407 a lien of a different character would arise for such "additional tax". The liens provided in the two sections are different, both in their creation and their life. That under Section 409 is for ten years from the "due date", while that in Section 407 does not arise until one month after notice and demand for its payment has been made and continues indefinitely until paid. It is this distinction which discharged the lien under

Section 409 when the tax was paid and would have permitted another lien to arise if an "additional tax" had been found while the 1921 Act was in force. There is sound reason for the distinction between "returned tax" and "deficiency" in estate taxes. The vast majority of estate taxes are returned correctly and paid. Deficiencies arise infrequently and usually are found long after the returned tax has been paid and at a time estates are ready for distribution. The lien for the returned tax is provided in order to enforce a prompt payment of that tax and avoid delay of distribution. By returning a tax the executors have confessed its correctness. With respect to a deficiency it may be said that its determination is not to be expected to such a degree as to warrant a lien therefor before its determination and the date it becomes final. Even when it is determined by the Commissioner, it is not final or certain, as is a returned tax. Therefore a separate lien for a "deficiency" meets reason and permits executors to distribute and be freed from liability. (See *Lindley v. U. S.*, 59 Fed. (2d) 336, 338.) So we assert that appellee's claim of a continuing lien under Section 409 is untenable. No "additional tax" being found against the Rosenberg estate during the life of the 1921 Act or before the estate was distributed, there could be no lien on the property when it passed to appellants on distribution.

IV. CONCLUSION.

In considering this case we would have the Court fully appreciate that we are not contending that any

revenue statute is illegal. Injunction is sought to restrain appellee from violating the provisions of the revenue acts involved and the administrative officers from resorting to illegal methods, interpretation, and procedure. We ask that these administrative officers be bound to conform to the powers granted them and do not exceed them.

Furthermore, this is not a proceeding to enjoin the collection of a tax. Appellants are not taxpayers, no assessment of a tax liability has been made against them, and no assertion or determination of any liability has been made against them as required by statute. They are strangers and outsiders to the operation of the Revenue Acts and appellee has made them so by his actions. (See, *The Lion Coal Co. v. Anderson,* supra.)

The brief of appellee does not establish his case. He admits his failure to comply with the applicable statutes (Sections 316 (a) and 308 (a) of the Revenue Act of 1926), he also admits that appellants may not pay the tax and recover as provided in Section 319 (a) of the 1926 Act, and he further admits that appellants are *not* barred from injunction by R. S. Section 3224.

Appellants respectfully contend that the judgment of the lower Court should be reversed and injunction granted as prayed for.

Dated, San Francisco,
February 6, 1933.

ADOLPHUS E. GRAUPNER,
Attorney for Appellants.